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Supreme Court of the United States

OCTOBER TERM 1952

No. 114

WINTHROP TAYLOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This reply refers to respondent's argument in Points 1, 2 and 3 of his brief (pp. 8-13) in opposition.

(1) Respondent's principal argument that the writ should not be granted is based upon the jurisdictional question raised under Section 1140 of the Internal Revenue Code. The Court of Appeals did not pass upon the contention of limitation raised by the respondent in his motion to dismiss (R. 19). The decision of the Court of Appeals denying the petition to modify the judgment was based upon its denial of the petition of 1944, the Court holding that the new matter presented for the first time and admitted by the respondent, consisting of the determination of the true deficiency by the Treasury Department and the opinion of the Department of Justice, afforded no ground for modifying the judgment. Since the Court of Appeals did not pass upon the jurisdictional question based upon the contention of limitation, the petition for certiorari did

not present to this Court such question as a reason for granting the writ. It would appear that such issue need not be decided to dispose of the case as no precedent has been created (*United States* v. *United States Gypsum Co.*, 333 U. S. 364, 387). It would also appear that the question is one of first impression not passed upon by the Court of Appeals and might not, therefore, be considered by this Court (*Graham* v. *Brotherhood of L. F. & E.*, 338 U. S. 232, 237).

If, however, this Court considers the question of limitation raised by the respondent, the petitioner submits that such an issue presents additional ground for granting certiorari since it involves an important issue of public law not heretofore decided under the unique factual circumstances of this case and which also may involve a conflict.

In the Court below the respondent raised the question of limitation under Section 1140 of the Internal Code as fixing a time when the decision of the Tax Board became final and in support cited *R. Simpson & Company* v. *Commissioner*, 321 U. S. 225; and *Monjar* v. *Commissioner*, 140 F. 2d, 263 (C. A. 2d) (pp. 19-20). In answer to this defense petitioner stated, in part, to the Court of Appeals:

> The Simpson case upon which respondent relies was a certiorari to review the affirmance of a decision of the Board as distinguished from an independent, original proceeding in this Court to obtain a review of its own decision upon extraordinary, equitable grounds. It involved a consideration of the merits of the tax case itself within the frame-work of that case.
>
> Petitioner here is not attempting to reargue the decision of the Board upon the record before it or asking a rehearing in the tax case. Petitioner is seeking relief in this Court in an original proceeding in equity upon facts never before presented and unknown to him when he sought relief before.
>
> It was definitely held in the Hazel-Atlas case, supra, that with respect to such a proceeding there is no time limitation. It is incidental that the judgment sought now to be modified, on the basis of subsequent recogni-

tion and concession of facts existing but not disclosed when it was rendered, involves a tax deficiency which has been fully paid. As the Hazel-Atlas case points out, generally speaking all judgments rendered by the District Courts and affirmed on appeal are unassailable after the lapse of time under the 'term rule' but this limitation does not apply to original proceedings known as bills for review invoking the equitable powers of this Court which under 'certain circumstances' will be exercised regardless of normal time limitations (Brief, p. 13).

Respondent also cites (Brief, p. 10) cases in support of the contention that the petitioner is barred by limitation pursuant to Section 1140 of the Internal Revenue Code (formerly Section 1005 of the Revenue Act of 1926). None of these cases, however, involves a situation similar to that disclosed by the record in the present case. They involve applications to the Board of Tax Appeals to open up or otherwise review adjudicated tax cases upon grounds having to do with controversial questions of law or other technical issues claimed to have been erroneously decided. None involves the invocation of independent traditional equity powers to correct judgments "manifestly unconscionable" and *admittedly* factually erroneous based upon a petition directed to the United States Court of Appeals instead of the Tax Board. Nor do they present admissions by the taxing authority that the judgment is factually erroneous and that the error was caused by the erroneous insistence of representatives of the Government.

In the case of *Sweet* v. *Commissioner,* 120 F. 2d 77, 81, cited and quoted by the respondent, while it is stated in the opinion that the ancient and still existing chancery practice has no place in the "statutory scheme" of adjudicating tax disputes before the Board of Tax Appeals, it does not follow that the Court of Appeals has been stripped of traditional equity powers to correct and modify its judgments under the principles of Hazel-Atlas. The *Sweet* case was a petition for leave to present to the Board of Tax Appeals

a motion to review an order redetermining a deficiency. The basis of the application was a subsequent decision in conflict with the interpretation of the statute, made by the Circuit Court of Appeals on review of the board's decision (p. 78). This was in no sense an invocation of the ancient equity practice involved in the present case.

Incidentally, the opinion in the *Sweet* case, in referring, at page 81, to *Buttenbach* v. *Commissioner*, 63 F. 2d, 630, which allowed the opening of a tax case by the Tax Board after the date of finality, implied that that case might have been properly decided "upon the peculiar circumstances" involved, there having existed no real controversy between the taxpayer and the Government.

In *Monjar* v. *Commissioner of Internal Revenue*, 140 F. 2d 263-265, cited by the respondent, the court found it necessary to distinguish *Buttenbach* v. *Commissioner*, 63 F. 2d 630, upon the ground of "extraordinary circumstances" arising out of a stipulation between the taxpayer and the Commissioner, stating that in the instant case there was no such agreement. Here, the Treasury Department, of which this respondent is the agent, has determined the proper deficiency.

Petitioner is not concerned with the disposal of applications to Tax Board made within the frame-work of the original tax proceedings. Our contention is that there is no statutory limitation to an original equity proceeding to correct judgments even in tax cases where the extent and extraordinary character of the error and the circumstances under which it was made are admitted.

Respondent, at page 11 of his brief, cites and quotes from *Rothensies* v. *Electric Battery Co.*, 293 U. S. 296. In this case the Court explains the rational basis for limitation in tax cases a basis, however, which does not exist under the circumstances here presented. In the present case there is nothing to be relitigated and no necessity "to produce vouchers, prove events, establish valuations and recall details of all that goes into an income tax contest." Nor does the case involve a revival of a case "allowed to

slumber until evidence has been lost, memories have faded and witnesses have disappeared". The Treasury Department itself has conferred finality in a true and factual sense by its determination of the correct deficiency and there is nothing left except to refund the excess collected because of the admitted fundamental error.

In order to obtain justice and equity petitioner is asking that the judgment be modified in conformity with the determination of the Treasury Department.

Respondent also cites, at page 11 of his brief, the case of *Denholm & McKay* v. *Commissioner*, 132 F. 2d 243. With respect to the meaning or reason for the statutory limitation urged by respondent it is of interest to note that the Court stated:

> "It was the evident purpose of the Congress in prescribing so minutely the dates on which the Board decisions became final in the various situations, *to enable the Commissioner to know exactly when he is at liberty to make the deficiency assessment*, upon the basis of which the Collector proceeds to collect the tax, in cases where the Board has found a deficiency. See Int. Rev. Code, Section 272 b) and (8), 26 U. S. C. A. Int. Rev. Code, Section 272 b, h" (p. 248). (Emphasis supplied.)

The foregoing judicial interpretation of the reason for the enactment of Section 1140 is confirmed by the quotation of the Congressional Committee report referred to by the respondent in his brief (pp. 8-9) as expressing the "purpose and effect" of the enactment. The report states in part:

> *"Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during the review of the Commissioner's determination, commences to run upon the day upon which the board's decision becomes final, it is of utmost importance that this time be specified as accurately as possible."* (Emphasis supplied.)

In the light of the foregoing, Section 1140 has no application with respect to limiting *the time of the petitioner* to modify in an equity proceeding the erroneous judgment. Moreover, no attempt is involved to arrest or delay collection—the tax has long ago been paid in full and the present application is merely to correct by modification the amount of the deficiency judgment.

(2) Under Point 2 of his brief respondent contends that Hazel-Atlas is limited to "after-discovered fraud" and therefore does not apply to the present case with respect to which the respondent states:

> "The asserted errors consist in the Court's decision that the stock involved had not been held for two years. The most that can be said is that the taxpayer has subsequently submitted evidence which was at all times available to him which if submitted at the original proceeding might have led to the opposite conclusion" (Brief, p. 11).

The above quotation does not correctly state the petitioner's position. The petitioner is not relying upon any argument that the stock involved had been held for two years or upon subsequently submitted evidence with respect thereto. The petitioner is relying upon the official determination of the true deficiency by the Treasury Department—the Government itself—which incontrovertibly has established the fundamental error and which the respondent has admitted. Supplementing this admission the petition has also pleaded the opinion of the Department of Justice, which the respondent also admits, stating the reason why the error was made, i.e., "The erroneous insistence of representatives of the Government". Under these factual circumstances it is submitted that the decision of Hazel-Atlas and similar decisions upholding long-established equity powers to correct fundamentally erroneous judgments are not limited in principle to cases of fraud. The lapse of time is incidental. In Hazel-Atlas twelve years intervened before justice was finally achieved.

(3) Under this point respondent's brief st f states:

> "*Incalculable confusion* would result f*was asserted* that of old tax cases *merely because it was* y many years be- questions had been decided incorrectly n raud is involved." fore when no claim of corruption or frau (Brief, p. 13, emphasis supplied.)

The respondent again incorrectly states the he petitioner's po- sition. A rehearing of the case is not involve olved and relief is not asked because of mere assertions that at questions had been incorrectly decided. Nor is any prejudi judice involved to any party or intervening interests. The m e modification of the judgment, achieving simple justice by a r a refund, instead of confusing will harmonize with the admin ministrative find- ings of the appropriate government agency cy computing the correct amount which should have been coll collected.

CONCLUSION

It is respectfully submitted that certiora iorari should be granted.

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Respectfully submitted,

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